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OPINION BELOW.

The majority and dissenting opinion of the three-judge District Court for the Eastern District of Pennsylvania is not yet reported.

The Opinions and the Order of the majority of said court dismissing the Complaint are to be found at page A78 of the Appendix.

JURISDICTION.

This suit, to enjoin the enforcement of a Pennsylvania statute as unconstitutional, was brought under 28 U. S. C. § 1343 and § 2281, and was heard by a three-judge court pursuant to 28 U. S. C. § 2284. The final decree of the three-judge court was entered on November 28, 1969; notice of appeal was filed in the District Court on December 17, 1969.

The jursdiction of the United States Supreme Court to review this decision by direct appeal is conferred by Title 28 U. S. C. § 1253. The jurisdiction of the Supreme Court to review the judgment on direct appeal is sustained by the decision in *Briggs v. Elliott*, 342 U. S. 350 (1952), and is in conformity with the procedure in *Abington School Dist. v. Schempp*, 374 U. S. 203 (1963).

This Court noted probable jurisdiction on April 20, 1970.

STATUTES INVOLVED.

The statute of Pennsylvania, the constitutionality of which was challenged before the three-judge court is Appendix A to the Complaint (App. A18).

> [The Act provides that all of the proceeds from a certain tax on horse racing up to $10 million, and one-half of all proceeds in excess of $10 million, shall, under the direction of the Superintendent of Public Instruction be used for reimbursement to nonpublic schools for the purchase of "secular" educational services. "Secular" services are defined as consisting of courses in mathematics, modern foreign language, physical science and physical education and the reimbursement is limited to the actual cost to a nonpublic school of the teachers' salaries, textbooks and instructional material used in the teaching of courses in those four categories. The Act requires that the textbooks and instructional materials be approved by the Superintendent of Public Instruction, that a satisfactory level of pupil performance shall have been attained, and makes provisions respecting teacher certification in nonpublic schools. The application for reimbrsement and the payments themselves take place after the close of the year in which the teaching occurs. The Act directs that the payments be made to the schoool itself and the school accounts are made subject to audit.]

The First Amendment of the Constitution of the United States, provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

and to petition the Government for a redress of grievances."

The Fourteenth Amendment, Section 1, provides as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED.

The three-judge court, sustaining a motion to dismiss, declared constitutional (Hastie, C.J., dissenting) a statute which provides for direct payments of public funds to sectarian, church-administered schools. The Complaint alleged that the statute violated the religious clause of the First Amendment and the equal protection clause of the Fourteenth Amendment. The majority found that (1) none of the plaintiffs had standing to raise the alleged violation of the equal protection clause, (2) that the individual plaintiffs had standing to raise free exercise questions but the Complaint failed to state a cause of action under this clause, and that (3) as to the one plaintiff with standing to raise the question under the establishment clause, the Act was constitutional on its face and therefore the Complaint failed to state a cause of action thereunder.

The questions presented are these:

1. Do organizational appellants such as these have standing to raise issues under the First and Fourteenth Amendments?

2. Do individal appellants have standing as taxpayers to raise issues under the establishment clause if they have paid state taxes, including school taxes, but not paid the specific tax, the expenditure of the proceeds of which is alleged to violate the First and Fourteenth Amendments?

3. Do the individual appellants have standing as taxpayers, citizens, residents and parents of children in the public schools, to raise the question of violation of the free exercise clause where they allege that, contrary to their religious consciences, they are being forced by operation of the taxing power to contribute to the propagation of religion by the supporting of sectarian schools?

4. Do any of the individual appellants, one of whom is a Negro, whose children attend the public schools, have standing under the equal protection clause, where the Complaint alleges that public funds are being disbursed under the Act to schools whose policies and practices, by purpose or effect, exclude or otherwise discriminate against persons by reason of race or religion and which are racially segregated either by design, tradition, policy, quota, cost, residential pattern, or religious requirement, and which further alleges that the subsidy from the Commonwealth will tend to perpetuate and promote such racial discrimination?

5. Does a Complaint which alleges that public monies are being paid over directly to sectarian schools owned, controlled and administered by religious bodies under an

Act which has as its primary purpose and effect the advancement of religion by the subsidization of sectarian schools state a cause of action under the religious clause of the First Amendment?

6. Does a Complaint which alleges that public funds are being paid directly to schools which are de facto racially segregated and which by purpose or effect discriminate on the grounds of race or religion state a cause of action under the equal protection clause of the Fourteenth Amendment?

7. Does a Complaint which alleges that legislation prefers one religion state a cause of action when, on a motion to dismiss, plaintiffs offer to prove that over ninety per cent of the recipients of the state funds are organs of a particular church?

8. Does a statute which declares that due to increases in costs in the public schools and the fact that twenty per cent of the school children attend nonpublic schools (97% of which are church schools) that the closing of a majority of the nonpublic schools would constitute an intolerable financial burden on the state and therefore provides subsidy to these schools constitute a constitutionally forbidden use of religious institutions to achieve a secular purpose and create a forbidden interdependence between church and state?

STATEMENT OF THE CASE.

In April of 1968 the Committee on Basic Education of the House of Representatives of the Commonwealth of Pennsylvania held extensive hearings. As stated at the outset by the chairman of that Committee, the purpose of the hearings was "to find out if state funds can be used for aid to nonpublic schools" in view of the fact that "these school systems are in serious financial difficulty."[1] The Committee, in a series of hearings,[2] of which the official transcript totals 800 pages, proceeded to do just that: it considered (by means of receiving testimony and by staff study) all of the various known or proposed channels and devices by which state aid could be given. The result was the Nonpublic Elementary and Secondary Education Act, Act 109 of the Laws of Pennsylvania, the statute here under attack. The scheme of the Act is that, from funds derived from a tax on flat and harness racing, the Superintendent of Public Instruction of the Commonwealth of Pennsylvania is authorized to cause the Treasurer of the Commonwealth to reimburse nonpublic schools, by cash or draft, for the cost to those schools of teachers' salaries, textbooks and teaching materials in the fields of mathematics, modern foreign languages, physical science, and physical education for the preceding year. The statute itself calls this a "purchase of services" and speaks of contracts to be entered into for such services. In the words of Chief Judge Hastie, dissenting in the court below, "This phrase is not descriptive of the statutory scheme." Chief Judge Hastie's description of the process is succinct:

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1. Official transcript, pp. 3-4, opening statement of Chairman Fox, Committee on Basic Education, House of Representatives Hearing of April 3, 1968.

2. A summary of the legislative proceedings comprises the Addendum to this Brief.

"A nonpublic school that desires financial aid under the Act need do no more than submit, on a form prescribed by the state, an application designating the portions of its curriculum for which it wants assistance. The State Superintendent of Education then agrees that the state will do what the statute requires, namely, pay the school such sums as Act No. 109 entitles it to receive. This is the so-called 'contract'. The school need not undertake to enlarge its curriculum or to increase its enrollment. Indeed, it can decrease its enrollment and diminish its curriculum and still qualify for state subsidy. It merely goes through a prescribed procedure for asking for aid and later proving that it has made expenditures that are reimbursable under the Act, without ever obligating itself to do anything for or in the interest of the state. The state buys no services and the school sells none." (App. A102)

Over $5 million is now being paid by the Commonwealth of Pennsylvania in installments, commencing with the first payment in September, 1969, for reimbursement for costs incurred by the nonpublic schools for the preceding academic year, 1968-69. Appellants' Complaint, which requested a three-judge court, sought a preliminary and final injunction restraining the appropriate officials of the Commonwealth from making any payments pursuant to the Act to the seven church-affiliated defendant schools, which were alleged to be typical of virtually all of the schools receiving aid. Of the pupils in nonpublic schools in Pennsylvania, 96.6% attend church-affiliated schools.[3] The Complaint alleged that the statute, on its face and as ap-

3. *Statistics on Nonpublic Elementary and Secondary Schools, 1965-1966*, Office of Education, U. S. Department of Health, Education and Welfare, OE-20111.

plied, authorized payment to sectarian educational institutions controlled by churches, having as their purpose the teaching and propagation of a particular religious faith and conducting their operations, curriculums and programs to fullfill that purpose; and further alleged that the overwhelming proportion of the recipient schools discriminated and/or were de facto segregated as to admissions and employment on the basis of race and religion.

With respect to the fact that these schools were the organs and instrumentalities of churches and religious groups, the Complaint alleged that the statute violated both the establishment and the free exercise clauses of the First Amendment and that as to the fact that the Act authorized the payment of funds to schools which discriminate on the basis of race and religion, or were segregated, violated the equal protection clause of the Fourteenth Amendment.

With respect to the violation of the religious clause of the First Amendment, the Complaint made certain specific allegations of fact. The Complaint alleged a violation of the establishment clause in that the Act provides for direct financial aid out of state funds to sectarian schools, that it finances and participates in the blending of sectarian and secular instruction, and that it has as its purpose and primary effect the advancement of religion. The free exercise clause was alleged to be violated by reason of the fact that the statute constitutes taxation for the support of religion.

The allegation of violation of the equal protection clause by reason of alleged racial and religious discrimination was based, in the Complaint, on the fact that the defendant schools and the preponderance of the other schools eligible for aid were *de facto* racially segregated in both admission of pupils and employment of teachers and administrators, such segregation arising "either by religious requirement, design, tradition, policy, quota, cost or

residential pattern." The Complaint alleged that tax aid by the Commonwealth would tend to perpetuate and promote such segregation, with the ultimate result of promoting two school systems in Pennsylvania—a public school system predominantly black, poor and inferior and a private, subsidized school system predominantly white, affluent and superior.

The Complaint was filed on June 3, 1969, together with a Motion for Preliminary Injunction and an Order for the appointment of a three-judge court. On July 7, 1969 appellants filed interrogatories and a Motion to Produce under Rule 34 upon defendant schools. All discovery was subsequently stayed pending disposition of several motions by defendants below, including motions to dismiss the Complaint for failure to state a claim and for lack of standing. On November 28, 1969, after briefs and argument, the District Court dismissed the Complaint, Chief Judge Hastie dissenting.

Appellants contend that the First Amendment is violated on a number of grounds.

In the first place, it was contended that any such payment from the Treasurer of the Commonwealth to the treasuries of sectarian, church-affiliated schools for their unrestricted use was a violation of the establishment clause, per se, under the rule of *Everson v. Board of Education*, 330 U. S. 1 (1946) forbidding any tax aid "to support any religious activities or institutions."

All parties below and the majority and dissenting judges below agreed that, if the Act were to survive the preceding point that direct tax subsidy was, per se, unconstitutional, the prime test to which the Act must then be submitted was whether the primary legislative purpose is secular *and* its primary effect one that neither advances or inhibits religion.

More particularly, it was alleged in the Complaint and contended in briefs and at oral argument that the primary legislative *purpose,* as revealed by the official legislative history, was to alleviate an alleged financial crisis of the Catholic parochial school system and thus to aid religion. This contention was, in form and in substance, made as an allegation of *fact* which appellants specifically offered to prove, after discovery, at trial.

As to the Act's primary *effect,* it was contended the Act on its face advanced religion since the Act, together with the official regulations promulgated by the Superintendent of Public Instruction (of which the Court could take judicial notice) involved a statutory scheme under which it was obvious that there was no actual purchase of services and that the Commonwealth received nothing in return for its money; and, alternatively, it was contended that discovery and trial would prove the foregoing by placing the regulations and the form of applications for the state aid formally in evidence, prove that the recipient schools were rendering no additional services and, in addition, demonstrate the all-pervading religious character and purpose of the approximately 97% of the recipient schools which are church affiliated.

It was further alleged and contended below that by reason of the fact that nine out of ten of the recipient church-related schools were Roman Catholic, the Act preferred one religion over another.

The Complaint alleged and appellants contended below that the very justification for the Act, contained in its own preamble and findings, accepted at face value, at the very least required the conclusion that the state was using religious means to further secular ends.

The Complaint also alleged and the appellants contended below that the Act on its face and as applied creates

a forbidden interdependence and fusion between religious institutions and the state. The specifics and particulars of this interdependence were offered to be put of record by the normal process of discovery and trial.

The case was originally framed as a class action, the class being the nonpublic schools in Pennsylvania which either are sectarian institutions or which, by purpose or effect, discriminate on the basis of race or religion. The class action status was dropped by the appellants and the Complaint amended to allege that the seven defendant schools were "typical" of all nonpublic schools which were church-related or which discriminated, rather than "representative" in the technical sense under Rule 23(c).

The majority below did not actually grapple with any of the above contentions nor did they at any time indicate that they felt the need for a record; the opinion simply reviews (and accepts) that preamble and factual and policy findings with which the final text of Act 109 was well-equipped.

The court, including the dissenting judge, found a lack of standing in all the plaintiffs to raise issues under the Fourteenth Amendment. These were essentially that the effect of the Act was to subsidize and perpetuate racial and religious segregation in the schools of Pennsylvania, which it was alleged were *de facto* segregated by design, tradition, policy, quota, cost, residential pattern or religious requirement. The court also decided that the organizational plaintiffs had no standing in the case at all, and that under their application of *Flast v. Cohen,* 392 U. S. 83 (1967), only the plaintiff who had purchased a ticket at the race track had standing to raise issues under the establishment clause. All of the judges agreed that the one plaintiff who had standing under the establishment clause by virtue of his ticket purchase lacked standing to raise the equal protec-

tion issue because, although a Negro and a parent of Negro children in the public schools, he did not allege that he had applied on behalf of his children for admission to any of the recipient schools. The court ignored the contention of the plaintiffs below that the Act, by reason of its subsidization and perpetuation of racial (and religious) segregation, had an adverse effect on the *public* schools which their children attended.

SUMMARY OF ARGUMENT.

As noted with specificity in the preceding Statement and with more particularity in the Argument, the Complaint made a broad range of allegations of the particulars in which the Pennsylvania Nonpublic Elementary and Secondary Education Act (generally referred to hereinafter as Act 109) violated the First and Fourteenth Amendments of the Constitution. The majority below, sustaining a motion to dismiss, did not find the Complaint defective as a matter of pleading. What the majority in the District Court did was to decide without benefit of answer, discovery, evidence or trial, that Act 109 was constitutional by simply placing before itself the Act with its declarations of purpose and findings and considering nothing else.

In so doing the court erred since (a) the Act is *per se* unconstitutional on its face and (b), since, if not, its basic concept, under which tax money is given to church institutions as a subsidy to be used by those institutions as they choose, is a scheme without precedent in American constitutional history. It therefore requires all of the invaluable setting which only the fullest development, by discovery and evidence, can provide.

By specifically refusing to consider the legislative history of the Act, the court misapplied the *primary legislative purpose* test called for by recent decisions of this Court.

By precluding discovery and the introduction of evidence, the court declined to make any inquiry whatsoever into the *primary effect* of the Act, in fact adopting the legislature's assurances, in the Act itself, that its effect was secular.

Appellants' offer to prove that 97% of the benefits of the Act were and would continue to accrue to the Catholic parochial schools and that therefore Act 109 preferred one religion over all others was totally ignored.

Likewise, the contention that the Act on its face and as justified by the Attorney General of the Commonwealth of Pennsylvania, at most, established that the legislation was an attempt to use religious means and institutions to accomplish secular ends was not dealt with in any way.

Appellants also plead in their Complaint and contended below and contend here that the scheme of the legislation and the underlying justification for it (that the state recognizes its dependence on the churches to educate one-fifth of its children and, on the other hand, that the church schools cannot continue to educate this many children of their faith unless the state subsidizes them) reveals that the Act establishes a forbidden interdependence between church and state. The majority below did not deal with this problem.

Finally, the majority below ignored what the dissenting judge perceived, namely, that the facade of the state entering into contracts for the "purchase of services" was a subterfuge in that the state does not actually receive any services for its money because the schools do not undertake any obligation whatsoever to educate any particular students or any additional students at all, the reimbursement for cost being at most the yardstick by which the amount of the monetary subsidy is measured.

As to the allegation that Act 109 violates the equal protection clause of the Fourteenth Amendment, the majority and dissenting judges below found a lack of standing in all of the appellants to raise that issue and did not, therefore, deal with the merits. Appellants contend that Alton Lemon, having alleged that he is a Negro and a parent of children in the public schools and having alleged that the effect of Act 109 will be to encourage, promulgate and perpetuate de facto segregation, to the detriment of the education received by his and other black children in the public schools, at least has that degree of *prima facie* nexus to the

complained-of unconstitutionality to survive a motion to dismiss. For only the process of discovery and trial can provide the court with the date required to adequately sift and weigh all of the circumstances so that a determination as to whether there is here such state action on behalf of segregation in education as to violate the equal protection clause.

ARGUMENT.

The Standards to Be Applied on the Sufficiency of a Complaint When Challenged by a Motion to Dismiss.

This section applies equally to the issues discussed below in "Part I—First Amendment" and "Part II—Fourteenth Amendment".

In moving to dismiss a complaint in the Federal court on grounds of failure to state a cause of action, the movant undertakes a very heavy burden indeed. Such a motion is in the nature of a general demurrer and it admits all of the well-pleaded material allegations of fact. Moore Fed. Practice, 12.08. The Complaint may not be dismissed unless it appears *to a certainty* that plaintiffs is entitled to no relief under any state of facts which could be proved in support of the claim. *Ballou v. General Electric Company*, 393 F. 2d 398 (C. A. 1st 1968).

Although it is a lower court decision, it is worth noting that a recent case in the same District Court, the Eastern District of Pennsylvania, makes the very point which should have deterred the majority below from attempting to resolve broad constitutional issues in the inevitable abstraction when the case is without a record:

> "A motion to dismiss should be approached with caution. *It should not be the vehicle for enunciating rules of law in the abstract.* Rather, if the factual situation has not crystallized, a court should await the utilization by parties of the discovery tools furnished by the Rules, followed by a motion for summary judgment under Rule 56." (italics added) *Miller v. Bargain City, U. S. A. Inc.*, 229 F. Supp. 33, 36 (E. D. Pa. 1964) (Joseph Lord, J.); accord *Melosonics Corp. v. Cropp*, 342 F. 2d 856 (3rd Cir. 1965).

Indeed, the test in Mr. Justice Holmes opinion in *Hart v. B. F. Keith Vaudeville Exchange,* 262 U. S. 271, 274 (1923), that dismissal could not be had unless "the claim is wholly frivolous," is still used and adverted to by federal courts on motions to dismiss, e.g., *Radovich v. National Football League,* 352 U. S. 445 (1957). If constitutional attack on Act No. 109 is frivolous, it is a frivolity predicted and expected by virtually every member of the legislature of Pennsylvania who spoke on the Bill. This standard, of course, would apply to both the challenge to the legislature on the church-state issues and to that under the equal protection clause of the Fourteenth Amendment. Judge Tuttle applied the same test in a class action in a school desegregation case. *Mannings v. Board of Public Instruction,* 277 F. 2d 370 (C. A. Fifth 1960).

Furthermore, weighing the Complaint against this minimal standard, liberal construction is to be employed in its favor. *Moore, op. cit., supra,* 12.08, and cases cited.

Moreover, as far as the First Amendment aspect of the case is concerned, the usual presumption of the constitutionality of legislation is removed by the doctrine of "the preferred place given in our scheme to the great, the indispensible democratic freedoms secured by the First Amendment." *Thomas v. Collins,* 323 U. S. 516, 530 (1945).

In issues of fundamental constitutional law the Supreme Court has not found it irrelevant that the practice was one of long custom and tradition. *Walz v. Tax Commission of the City of New York,* No. 135, October Term, 1969, May 4, 1970, 38 LW 4347. Here, no one denies that the Pennsylvania scheme embodied in Act 109 is innovative and its mechanism somewhat complex. From every standpoint it would seem unwise to dispose of such a question on a motion to dismiss. Actually, in terms of the judicial process, more justification would be found for declaring such an act unconstitutional without a record than to declare it constitu-

tional, since an act unconstitutional on its face cannot be saved by evidentiary material where an act which is either constitutional on its face or of uncertain constitutionality may prove to be unconstitutional when a record is established.

The purpose of the succeeding sections of Argument is to set forth in somewhat abbreviated form material from decisions of the Supreme Court which would indicate that Act 109 necessarily raises the gravest constitutional questions and to set forth some of the factual material which appellants would undertake to prove which would create a substructure of recorded fact upon which those constitutional principles could operate.

PART I.
ACT 109 VIOLATES THE FIRST AMENDMENT.

A. The Legislation Is Unconstitutional Per Se, and on Its Face.

If the principles enunciated over the years by the Supreme Court are to be followed, the Complaint, having alleged that tax funds are to be paid over without restriction to church institutions, states a cause of action on this core allegation alone. It is not without significance, particularly in light of the comments of the Supreme Court in *Walz v. Tax Commission, supra,* that no case has ever been found in which public money was paid over to church institutions.

Two cases appear to raise the issue but were disposed of on other grounds.[4]

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4. *Cochran v. Louisiana State Board of Education,* 281 U. S. 370 (1930) involved a Louisiana statute providing for state purchase of secular textbooks for use by children attending both public and private (including parochial) schools. The statute was not attacked as a violation of the First Amendment requirement of church-state separation, since it was then generally assumed that this mandate of the First Amendment applied only to the Federal government and not to the states.

Bradfield v. Roberts, 175 U. S. 291 (1899) is not very instructive in our situation. There, the Providence Hospital in the City

In the course of deciding a number of other cases in which it was alleged that the legislative measure before the Court *indirectly* aided religious schools, the Court has oft reiterated that tax money could not be paid over to religious institutions and in each case was at pains to point out that that was not being attempted in the particular case before them.

In *Quick Bear v. Leupp,* 210 U. S. 50 (1908), the Court held that funds held for their Indian owners by the Federal government as trustee could constitutionally be disbursed to pay the cost of tuition for the Indians at private, religious schools which they desired to attend. The Court upheld the expenditures because the funds belonged to the Indians and not to the government; i.e., were not public funds. The Indians had the right to use their own money to educate their children in the schools of their own choice, even if the government could not disburse its own money to the same schools because of the First Amendment.

In *Everson v. Board of Education,* 330 U. S. 1 (1946), the Court ruled by a vote of five to four that a state (New Jersey) could constitutionally finance bus transportation of children to parochial as well as public schools. The Court

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4 (cont'd)
of Washington entered into a contract with the municipal authorities under which two isolation buildings were constructed by the Commissioners of the District on the grounds of the Hospital, under an agreement that two-thirds of the capacity of the isolation buildings was to be reserved for the use of "such poor patients as shall be sent there by the Commissioners . . ." For each patient so sent the Commissioners paid a specified rate. A suit was brought by a taxpayer of the United States and a resident of the District of Columbia, seeking an injunction on the grounds that the Providence Hospital was a private ellmosynary corporation and that "to the best of complainant's knowledge and belief it is composed of members of a monastic order or sisterhood of the Roman Catholic Church, and is conducted under the auspices of said church; . . ." The court, however, did not actually reach the First Amendment question because they concluded that "we are not able to say that the complainant in his bill shows that the corporation is of the kind described, but on the contrary he has clearly shown that it is not."

found the program to be a public safety measure to protect all children from traffic hazards and the dangers of the road, it being a fact that bus transportation was safer than any other available form.

The Court at the outset made the point that "the State contributes no money to the schools. It does not support them."

The Court then said:

> "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." 330 U. S. at 16.

Note that the Court did not limit the prohibition upon what New Jersey could do to the use of tax-raised funds to support the *teaching of* the faith of any church but rather included within the ambit of the stricture a prohibition against using "tax-raised funds to support of an institution *which teaches* the tenets and faith of any church."

There then followed the famous *Everson* exposition of the meaning of the establishment clause, which included within it the following:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 330 U. S. at 16.

This same quotation appeared in the majority opinion in *McCollom v. Board of Education,* 333 U. S. 203, 1948.

In *Zorach v. Clauson,* 343 U. S. 306 (1952), the Court upheld (three justices dissenting) the constitutionality of a program of released time for religious education under which children would be released from public school for one

hour a week to receive religious instruction elsewhere, because no expenditure of public funds or use of public buildings was involved. The Court said: "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education. . . ."

In *Torcaso v. Watkins,* 367 U. S. 488 (1961), which concerned an oath of office, the Court again repeated the statement made in the *Everson* and *McCollum* cases, quoted above.

In *Engle v. Vitale,* 370 U. S. 421 (1962), the Court, in holding unconstitutional the practice of prayer recitation in the public schools, which had been prevalent almost since the founding of the public schools, stated that when "the power, prestige *and financial support* of government is placed behind a particular religious belief," the Establishment Clause of the First Amendment is violated (Emphasis supplied).

There then came the decision of the Court in *Abington School District v. Schempp,* 374 U. S. 203 (1963), which case provided an opportunity for a most exhaustive inquiry by the various members of the Court into the core meaning of the religious clause of the First Amendment, particularly as related to schools.

The holding itself is succinctly stated in the following headnote:

> "Because of the prohibition of the First Amendment against the enactment by Congress of any law 'respecting an establishment of religion,' which is made applicable to the States by the Fourteenth Amendment, no state law or school board may require that passages from the Bible be read or that the Lord's Prayer be recited in the public schools of a State at the beginning of each school day—even if individual students may be excused from attending or participating in such exercises upon written request of their parents."

On the bare holding alone it is difficult to see how the instant legislation can survive. If it is a violation of the First Amendment to merely read ten verses of the Bible in the public schools (the essence of whose "publicness" is their support by tax funds), an event from which children may be excused, how can tax funds be appropriated to schools whose entire raison d'etre is religious and in which religious instruction, symbols, readings, and ceremonies abound![5] *Board of Education v. Allen*, 392 U. S. 236 (1968) followed. Its holding is discussed below, but again, in sustaining the loan of textbooks to all school children, including those attending parochial schools, it was emphasized that the *school* received nothing. It stayed well over on the "child benefit" side of the line.

It must be borne in mind that here the tax money is paid to the general treasuries of the church institutions; the cost of "secular services" are, at most, merely a means of measuring the amounts each institution receives.

If these principles, steadfastly repeated by the Supreme Court, mean what they say, the Pennsylvania legislation is

5. One of the effects of Act 109 is to render the schools receiving aid thereunder public schools, at least *pro tanto*. The Attorney General recognized this fact in his brief in the court below since he justified the legislation on the grounds that it is a means selected by the legislature to satisfy a mandate of the Constitution of Pennsylvania (p. 8, et seq.). The constitutional provision in question requires the General Assembly to "provide for the maintenance and support of a thorough and efficient system of public education . . ." To the extent that the Court were to accept the Attorney General's argument that Act 109 is pursuant to Article III, § 14 of the Pennsylvania Constitution (the Article above quoted), *Schempp* would compel a holding that Act 109 is unconstitutional. The dilemma of the Commonwealth is plain: on the one hand the legislature must be found to have had a secular purpose and one within their powers, and the Commonwealth attempts to satisfy these requirements by pointing to Article III, § 14; but that directs the maintenance of "public" education and at that point *Schempp* operates to clearly require that all religious ceremonies or observances of any kind whatever in the defendant schools be eliminated. An amendment to so provide was offered in the Senate and was defeated. *Legislative Journal—Senate*, June 12, 1968, p. 377.

nconstitutional on its face, irrespective on the one hand of hat mechanical device is employed to channel or measure he extent of the public funds, and irrespective on the other and, of the specific unconstitutional features discussed be-ow. On this core concept of the Pennsylvania Act plaintiffs oncede that no discovery is required and since the Act lainly states that tax funds are to be paid to nonpublic chools for nothing other than doing what their faith man-ates they should do (over nine out of ten being church-ffiliated) and which they have been doing, this Court, at his juncture, even on this record (the statute being before hem) has grounds for declaring the Pennsylvania Act un-onstitutional.

At the very least litigation challenging a state law nder which public funds are paid directly to the treasuries religious institutions should be tried, not dismissed. The wer court did not deal with this point.

B. The Test.

All parties and the majority and dissenting judges low agreed that, if the Act were to survive the preceding int that direct tax subsidy was, per se, unconstitutional, e prime test to which the Act must then be submitted was at originally formulated by Chief Justice Warren in *cGowan v. Maryland*, 366 U. S. 420 (1960), and repeated d developed in *Abington School Dist. v. Schempp, supra*, d *Bd. of Education v. Allen*, 392 U. S. 236 (1968); namely, ether the primary legislative purpose is secular *and* primary effect one that neither advances or inhibits igion.

The test was originally formulated by Chief Justice arren in the *McGowan* case as follows:

> "We do not hold that Sunday legislation may not be a violation of the 'Establishment Clause' if it can

be demonstrated that its purpose—evidenced either on the face of the legislation, *in conjunction with its legislative history*, or in its operative effect—is to use the state's coercive power to aid religion." (italics added) 366 U. S. at 453.

Its latest statement in *Allen* is as follows:

> "Based on *Everson, Zorach, McGowan*, and other cases, *Abington School District v. Schempp*, 374 U. S. 203 (1963), fashioned a test ascribed to by eight Justices for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits:
>
> > 'The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits, religion. Everson v. Board of Education.' 374 U. S. at 222." 392 U. S. at 243.

Paragraph 18 of the Complaint alleged that the Pennsylvania Nonpublic Elementary and Secondary Education Act, on its face and as applied, "(c) has as its purpose the advancement of religion and (d) has as its primary effect the advancement of religion."

More particularly, it was contended in briefs and at oral argument that the primary legislative purpose, as revealed by the official legislative history, was to alleviate an

alleged financial crisis of the Catholic parochial school system and thus to aid religion. This contention was, in form and in substance, made as an allegation of *fact* which appellants specifically offered to prove, after discovery, at trial. Appellants proffered the factual basis for the Complaint's contention that the legislative purpose was to aid religion by including in their brief verbatim excerpts from the hearings, committee reports, and debates on the floor of the House and Senate of Pennsylvania and proposed that the three-judge court take judicial notice of these official documents of the Legislature of Pennsylvania; or, in the alternative, offered to introduce them into evidence at trial. This material now comprises the Addendum to this brief.

As to the Act's primary *effect*, it was contended that the Act on its face advanced religion since the Act involved a statutory scheme under which it was obvious that there was no actual purchase of services and that the Commonwealth received nothing in return for its money; and, alternatively, it was contended that discovery and trial would prove the foregoing by placing the regulations and the form of applications for the state aid formally in evidence, prove that the recipient schools were rendering no additional services and, in addition, demonstrate the all-pervading religious character and purpose of the approximately 97% of the recipient schools which are church-affiliated.

The majority below concluded that the allegation that the primary purpose and primary effect of the Act was to aid religion was a conclusion of *law*, and as such, not admitted for the purpose of testing the sufficiency of the complaint. Having established that proposition, the court then said:

> "The question of law then presented is whether the purpose or primary effect of the Pennsylvania Education Act on its face or in the necessary effect of its ad-

ministration is to advance or inhibit religion." (App. A88)

This question was answered by the court entirely and solely by reference to the text of the Act itself. The majority determined the legislative purpose by accepting what the legislature itself, in the Act's preamble and findings, declared its purpose to be: "To promote the welfare of the people of the Commonwealth of Pennsylvania; to promote the secular education of children of the Commonwealth of Pennsylvania attending nonpublic schools; . . ." Other facts, declared to be facts by the legislation under attack, were accepted by the majority, e.g., the burden on the public treasury if private institutions were to cease to "bear their present educational burdens." The majority specifically declined to examine the legislative history because "the legislative findings of the state are not to be lightly set aside." (App. A92)

Having thus posed the problem, the majority proceeded to simply track, by quotation or in its own paraphrase, all of the declarations of policy, legislative findings, etc., with which the Pennsylvania Act was well fortified, and accepted the "purchase of services" concept as bona fide (appellants contended that discovery and evidence would demonstrate that it was a subterfuge if that was not obvious on its face).

The majority made frequent reference to *Board of Education v. Allen, supra.* The opinion quoted the observations in Mr. Justice White's opinion that religious schools perform secular functions. But, as the dissenting judge pointed out, no funds went to church institutions in that case and most all churches perform a variety of secular functions by way of care of the aged and infirm and wayward. Although not specifically citing these cases as a precedent, it *appears* that the lower court majority believed that *Everson*

v. Board of Education, supra, and *Allen* gave sanction to the Pennsylvania scheme. The obvious differences between supplying buses or books to children (or parents) and paying money into a church institution's treasury was ignored although both *Everson* and *Allen* were at pains to point out that no money went to the schools themselves.

Furthermore, the majority below did not come to grips with two more basic points of difference between the *Everson-Allen* situation and Act 109.

In those cases the benefit is conferred directly upon children and parents and only indirectly upon the institution, as is the case with police and fire protection and school crossing guards. Under Act 109 the subsidy is conferred directly upon the institution and only indirectly upon the children. The reason this difference is not merely one of form is that it is the direct financial relationship thus established, with the necessary attendant state supervision, that brings about a forbidden interdependence of state and church which cannot come into being by supplying children with a specific benefit like buses or books.[6]

A further difference, apparently not perceived by the lower court majority, is that the legislation under scrutiny in *Everson* and *Allen* conferred upon the children a specific benefit which they did not previously enjoy (that feature is absent here—there were no children without instruction in the specified subjects); here the legislation simply confers a benefit on church *institutions* which they previously did not enjoy.

Finally, the nature of bus transportation and bussing is finite in quantity; the nature of a cash subsidy, as Chief Judge Hastie said, is limited in amount only by the political power of religious groups.

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6. This difference is similar to Mr. Justice Brennan's analysis of the difference in result between *McCollum* and *Zorach*, as expounded in his concurring opinion in *Schempp*. See 374 U. S. at 262.

If the decision of the majority below were to prevail, it would, in one stroke, validate the efforts of the legislatures of the formerly *de jure* segregation states, to perpetuate school segregation via subsidies to "private" schools by binding the judiciary to those facts, policies and purposes which the legislature itself declared. The ingenuousness of the majority below has not been a characteristic of the Supreme Court in examining statutes under constitutional attack.

For particularly in First Amendment and equal protection areas, it is and historically has been the marked proclivity of legislatures bent upon accomplishing some political or social measure, where the object or the means appear to be of doubtful constitutionality, to camouflage their handiwork. Frequently this is done by setting forth in a preamble, or in declarations of legislative policy and legislative findings, constitutionally self-serving material.[7]

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7. In constitutional law, particularly in cases involving legislation which may invade First Amendment-protected areas, the courts have consistently looked through legislative window-dressing and have also been studious not to allow to be done by indirection that which could not be constitutionally done directly. Thus, licensing provisions which in any way inhibit free speech or assembly have regularly been stricken down, although clothed as merely regulatory measures within the police power. *Cantwell v. Connecticut,* 310 U. S. 296 (1940). Parade and picketing ordinances licensing ordinances for the use of parks and squares, sound-truck ordinances, loitering and disorderly conduct statutes are always put forth as having been passed under the guise of the regulation of traffic, public places, etc., which the courts have just as regularly seen through where their effect is even a tendency to stifle speech: *Thompson v. City of Louisville,* 362 U. S. 199 (1960); *Shuttlesworth v. Birmingham,* 382 U. S. 87 (1965); *Hague v. C. I. O.,* 307 U. S. 496 (1938); *Thornhill v. Alabama,* 310 U. S. 88 (1940); *Schneider v. State,* 308 U. S. 147 (1939). In field after field the Court has pierced veils of legitimacy erected by legislatures bent upon evasion of constitutional prohibitions. In *Gomillion v. Lightfoot,* 364 U. S. 339 (1969), there was a geographic redistricting of Alabama state legislative districts. The Court looked past the form of the act:

> "While in form this is merely an act of redefining metes and bounds, if the allegations are established, the inescapable

If a legislature could insulate itself from a constitutional attack by making findings that its acts are constitutional, or other findings (no matter how contrary to the facts) which are to be deemed binding upon the courts, the whole power of judicial review would be stultified and the doctrine of the separation of powers handily subverted.

Actually, in the appellants' view, the majority of the lower court misapplied the *McGowan-Schempp-Allen* test altogether. In the first place, in the original formulation of the test, Chief Justice Warren in *McGowan* specifically calls for the purpose of the legislation "to be examined in conjunction with its legislative history."[8] 366 U. S. at 453. This makes it clear that the test in question is *not a mere rule of statutory construction but part of the substantive law of church-state cases.*

The court did not "search out the fact and truth . . . to determine if the Constitution has been violated," as required by *Evans v. Abney,* 396 U. S. 435 (1970).

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7 (cont'd)
human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights."

This device did not prevail. The Court stated:

"A statute which is alleged to have worked unconstitutional deprivations of the petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries."

In *NAACP v. Button,* 371 U. S. 415 (1963), the Court looked through a plausible Virginia regulation which on its face appeared solely to be concerned with the suppression of barratry and champerty and case solicition to discern that its real purpose and effect was to inhibit the activities of the NAACP and the NAACP Legal Defense Fund in the institution of suits challenging racial discrimination.

8. A complete summary of the hearings before the Committee on Basic Education of the House of Representatives of the Commonwealth of Pennsylvania, held between April 3 and April 17, 1968, and excerpts from the debates on the floor of the House of Representatives and the Senate of the Commonwealth of Pennsylvania, are contained in an Addendum to this brief. The condensation is not selective. No material was found suggesting that there was *any* purpose of the legislation other than aiding the Catholic parochial schools and, in one or two instances, other parochial schools.

The legislative history as set forth in the Addendum is that the sole legislative problem of the alleged financial plight of the parochial school system and the sole legislative purpose was to in some way meet that problem.

What emerges from the legislative history (see Addendum) totally negates the defendants' posture, adopted by the majority below. Their position is, as it must be, that the state felt the need of obtaining teaching services in mathematics, modern foreign languages, physical sciences, and physical education and, to fulfill this need concluded that it should contract out these functions to private contractors, the merely consequential result of this being an indirect benefit to religious schools, constitutionally permissible since the primary purpose is secular. The legislative history is directly contracy. It makes it clear that far from the state having a *need* to purchase services, that purchase of services emerged from a dozen methods by which the financial *need* of religious schools might possibly be satisfied.

In *Grosjean v. American Press Co.*, 297 U. S. 233 (1935), at 250, the court had before it a tax upon advertising partially measured by the circulation of periodicals. The innocuous and legitimate facade was pierced in the following passage:

> "It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantee." [p. 250].

Where a properly pleaded issue under the establishment clause is raised in the context of some form of state aid to religious institutions, the substantive law of church-state relations requires a determination of the primary legislative purpose and, as a matter of substantive law, re-

quires the court, in determining that purpose to, *inter alia*, consider the legislative history of the questioned statute. It was error for the majority below to decline to take any notice of the proffered legislative history.

C. Purchase of Services?

The majority below adopted the contention of the defendants in their brief below that under Act 109 there was a "quid pro quo exchange, pursuant to contract. . . ." The majority accepted the facade of the face of the Act that what the statute authorized was for "the Superintendent of Public Instruction to enter into contracts." They speak of the payment made to the schools under Act 109 as being "in discharge of contractual obligations," which "may be made only after the service has been rendered." (App. A82) Chief Judge Hastie's dissenting opinion rejected this conclusion of fact and found that there was no "contract" in any proper sense of the word since the schools were not obligating themselves "to do anything for or in the interest of the state. The state buys no services and the school sells none. The artificial characterization of this procedure as 'contracting for secular educational services' does not help our constitutional problem." (App. A102).

What the dissenting judge rightly perceived from the face of the Act appellants offered to prove as a matter of fact, after discovery, i.e., that the Commonwealth of Pennsylvania, which paid the schools, commencing in September, 1969, for "educational services rendered in the preceding academic year", in fact received nothing. Appellants offered to prove that no children were being educated by the recipient schools that had not been previously educated by them prior to the subsidy; that indeed there was no change in the educational status quo whatsoever except for the transfer of a sum of money from the state to the nonpublic schools.

Neither the Attorney General nor counsel for any of the schools have ever been able to advise us how, or in what way, the payments to the nonpublic schools "advance the quality of the secular education," or just what it is the Commonwealth gets for its money.[9] The Act does no more than to confer (somewhat capriciously) varying amounts of public funds on private and religious institutions for doing what they were already doing for their own reasons and will continue to do as long as it is an imperative of their faith to do so. In short, the educational status quo has been left unchanged.

The majority below adopted the Attorney General's contention that the Act advances the quality of the secular education that each child of the Commonwealth will receive. The court, however, did not delineate how this was effectuated by Act 109. Clearly, as to the great majority of children who are in *public* schools the Act has no effect except that it may have reduced the amount of money available for their education.[10]

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9. It is noteworthy that the Attorney General does not advert to the *in terrorum* argument that was consistently advanced in the press and during the hearing and on the floor: that if the parochial schools did not get this assistance, they would be forced to close and the children would have to be educated in the public schools. Of course, this argument is not made because in the first place the defendants would have to prove this to be the case; but more importantly, it would not be a justification for an otherwise constitutional enactment—it never having been a principle of constitutional law that it is all right to do something unconstitutional if it would be inconvenient and more costly to do it constitutionally. Several states educate as high as 98.5% of their children in public schools.

10. Mr. Fox (Chairman of the Committee), L. J.—House, May 7, 1968, p. 501:

> "As every member of this House knows, we have passed a bill providing additional money for public schools. I am one of the members of the conference committee on that and we have been struggling so far rather vainly to find some additional money to finance that bill, to finance the program that we have already passed, and if we cannot find the money to finance that program, then most assuredly we cannot find an additional $26 or $27 mil-

As to all of the rest of the children, those in the non-public schools, we are likewise at a loss as to how the quality of their education has been improved. Perhaps discovery would disclose some improvements, but, if so, this will only lead to further constitutional difficulties. Either the school in question met the state's standards or it was not supposedly eligible to become a contractor. Subsidies to improve education on these subjects above and beyond the state's standards would manifestly be a discriminatory and unconstitutional use of tax funds to benefit private or parochial schools.

1. The Private Academies.

One way to ascertain whether the Act's purpose was, in fact, to improve the quality of the education of the children of the Commonwealth of Pennsylvania in the subjects of mathematics, modern foreign languages, the physical sciences and physical education, is to see whether the scheme adopted by the Legislature is entirely consistent with this alleged objective, or whether there is inherent in it significant elements which are inconsistent with the purpose now asserted.

In *Grosjean v. American Press Co.*, 297 U. S. 233, 250 (1935) the Court said:

> "The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing

10 (cont'd)
lion to replace what is being taken out by House bill No. 2170 [Act 109]. Consequently, it seems to me that it is incredible that we, when we do not have assurance of money in the general fund to finance a program that we have already passed, would endeavor now to pass a new program removing an additional $26 or $27 million from the general fund."

the publishers and curtailing the circulation of a selected group of newspapers."

One must likewise view with suspicion legislation which talks of educational needs and financial crises but results in the richest 3% of the schools getting one quarter of the available nonpublic school funds.[11] On the other hand, if there had once been injected into the Bill criteria based on *need*, it would be the *need* of the school, not the State or the pupils, and the elaborate window-dressing of purchase of services would collapse.

The Act, as passed, as we know, provides aid to all nonpublic schools, irrespective of their need. The question that presents itself is whether there was a rational legislative purpose for conferring aid on schools which obviously do not need aid, or whether this was done in order to either quiet political opposition or insulate against legal attack in order to further the main purpose of the Bill, which was to provide aid for Catholic parochial schools.[12]

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11. For example, the Penn Charter School, located in Philadelphia, has 726 pupils. It has a physical plant valued at over $4,000,000, a 10,000 volume library, 4 gymnasiums, 10 athletic fields, 8 tennis courts, 2 swimming pools, 2 indoor squash courts, and separate parking lots for faculty, seniors and juniors. Its endowment is $3,700,000. It will receive $57,000 this year, according to news reports. The Cardinal Dougherty High School has 5,800 pupils—almost 9 times as many—and it will receive $48,000. Discovery would put this situation of record for the State as a whole.

12. During the hearings and the debates, there was some restiveness with the prospect of conferring financial aid on wealthy private schools. Even William B. Ball, testifying as counsel for the Pennsylvania Catholic Conference, suggested that there should be some criteria relating to need (Page 65, Hearings, Committee on Basic Education). On April 3, 1968, Mr. Ball suggested: "I think there ought to be a limitation there. I fully see your point. The fancy academies don't need this, and their problem is not a public problem. Whether constitutionally you can separate is another question. I think you can."

Since the Legislature, rightly or wrongly, and the principal proponents of the Bill believed and agreed that aid to "fancy aca-

Appellants are prepared to prove that, the protestations of the private schools to the contrary, few, if any, of the traditional, high tuition, exclusive private academies are in any sense in need of state subsidy in order to continue teaching, and teaching very well, mathematics, foreign languages, physical sciences and physical education. The significance of this is not that it is unconstitutional for a state to confer its tax bounty upon those who do not need it, but rather that it pointedly illustrates the fact that "purchase of services" is a subterfuge.

When fundamental constitutional principles are at issue the courts have had no difficulty in piercing the facade of contrived legitimacies. As was said in *Lane v. Wilson*, 307 U. S. 268 (1938), with respect to the Fifteenth Amendment:

> "The Amendment nullifies sophisticated as well as simpleminded modes of discrimination."

Chief Judge Hastie saw through the purchase of services device by scrutiny of the face of the Act. Likewise he found that the "primary purpose and effect of the enactment is to help the non-public schools by supplying them with needed financial aids . . ." (App. A102), without referring to the material on legislative history in his opinion. Even on the present record of Complaint and the text of the statute it is suggested that this Court could do the same, with or without reliance upon the legislative history (of which judicial notice could be taken, the records being

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demies", to use Mr. Ball's phrase, was unnecessary, one wonders how, to the extent that they are included, the Bill serves any educational duty or purpose of the State. The children attending these schools were, of course, being well instructed at the time of the Bill's passage in these four subjects; it is not suggested that any additional children are now attending Mercersburg Academy, Episcopal Academy, or Penn Charter, or Shipley, or Baldwin, or Chestnut Hill Academy, or that they are receiving instruction in these four subjects out of the funds paid by the Commonwealth.

official, filed records of the Commonwealth and no suggestion having been made that the material set forth in the Addendum is inaccurate or selective).

D. The Act Prefers One Religion Over Another.

In the oft-referred to classic exposition of the religious clause of the First Amendment in the *Everson* case, one of the strictures, of long lineage; reaffirmed in that famous paragraph was:

> "Neither [the state or federal government] can pass laws which aid one religion, aid all religions or prefer one religion over another."

We have argued that the law aids "religions," but also plead and argued below the separate point that the law prefers one religion over another or, at most, two or three religions over all others.

Appellants set forth, in briefs filed below, considerable factual data which they offered to prove, if given the opportunity. This data, if properly put of record would prove that the effect of the legislation is to (a) aid and prefer the Catholic religion above all others, (b) to a lesser extent aid and prefer only those other four or five religions which maintain any parochial schools, and (c) discriminate against those religions who do not or cannot have church schools by reason of conviction, poverty or smallness of membership.

The court below totally ignored the point and the offer of proof. The contention of illegal preference and the offer to prove it as a fact was not alluded to in the majority opinion below.

Thus, as the record now stands, the lower court has ruled, *sub silentio*, that a complaint under which a plaintiff charges that state legislation, by purpose and effect, di-

rectly favors particular religions in a substantial degree does not state a cause of action under the religions clause of the First Amendment.

Nor was the factual proffer insubstantial or of dubious validity. It was drawn from government statistical sources.

Act 109 prefers the Catholic religion about all others. The Catholic religion is not only the principal, but almost the exclusive, beneficiary of the Act. Indeed, we have demonstrated in another portion of the brief, dealing with the legislative history of the Act, that aid to the Catholic church was the motivation and purpose of the legislation. The statistics confirm that this is the Act's effect.

Of the pupils in nonpublic schools in Pennsylvania, 96.6% attend church-affiliated schools.

In 1966, of the 1140 church-related elementary schools in Pennsylvania all but 56 were Roman Catholic. Of the 276 church-related secondary schools in Pennsylvania all but 27 were Roman Catholic.[13]

But beyond this, the Act prefers, to a much lesser extent, the very few sects which maintain any five-day, full-time schools at all.[14] One need hardly point out the vast number of churches, therefore, which do not maintain regular five-day schools and therefore have no way to participate in the benefits of the Act. There are any number of sects which are barred from any participation in the Act either (a) because they do not believe in parochial schools (e.g.,

13. Statistics of Non-Public Elementary and Secondary Schools, 1965-66, Office of Education, U. S. Dept. of Health, Education and Welfare, OE-20111, Tables 3a, 3b.

14. There are 15 elementary and 7 secondary schools maintained by the Friends. There are 14 elementary and 2 secondary schools maintained by the Lutherans. There are 27 elementary and 9 secondary schools maintained by the Seventh-Day Adventists, 8 elementary and 4 secondary schools maintained by the Jews, and there are 7 elementary and 3 secondary schools maintained by the Protestant Episcopalians. The Methodists and Baptists each maintain two schools, and no other sect maintains any accredited schools.

Jehovah's Witnesses, Unitarian Universalists, and a majority of Jews), (b) maintain parochial schools but believe aid violates separation of church and state (e.g., Seventh-Day Adventists,[15] some Quakers, Mennonites, Amish), or (c) are too poor to even conceive of maintaining a school system (e.g., Gospel Halls of the Plymouth Brethren, Negro Baptists, African Methodists, Churches of Good in Christ, Black Muslims, innumerable evangelical and fundamentalists sects, and the storefront evangelical sects), or (d) are small sects whose members are too few in numbers and too scattered to make it feasible, (e.g., Dutch Reformed, Moravian, Schwenkfelder, Swedenborgian, Wesleyan). Other relatively numerous sects such as Reformed Evangelical, United Churches of Christ, Congregationalist, Baptists and Methodists, Eastern Orthodox and Episcopal Reformed, do not in fact maintain a parochial school system, and will not benefit, but their reasons are not known. According to the Yearbook of American Churches, in 1961 there were 254 recognized religious bodies and sects in the United States. Under the provisions of Act 109, all of them are paying for the promulgation of religious tenets of others.

If the foregoing data is true, the Pennsylvania Nonpublic Elementary and Secondary Education Act violates both the establishment clause and the free exercise clause of the First Amendment.

Appellants need not, as the lower court seemed to require, plead what their own religious beliefs (or absence of them) are in order to be heard when they complain that they are being taxed to support the promulgation of the religious beliefs of others.

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15. Which sect nevertheless testified against the Bill on principle and has declined to apply for aid.

E. Under the Theory of the Lower Court, the State Is Using Religious Means to Serve Secular Ends.

Appellants have alleged that the primary purpose and the primary effect of Act 109 is to serve religious interests.

But if the theory of the appellees, and the majority below, is that the primary purpose and effect is secular, the Act runs into difficulty by reason of *McGowan* and *Torcaso, supra,* since at very least it employs "religious means to serve secular interests."

The Commonwealth's insistence that the Act does no more than employ, by contract, religious schools to teach secular subjects is not credible, but if accepted simply shifts the focus of constitutional infirmity from one point of vulnerability to another. In addition to the stricture against using religious institutions to carry out secular ends in *McGowan* and *Torcaso,* in *Schempp, supra,* Mr. Justice Brennan said:

> ". . . government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that non-religious means will not suffice." (p. 265)

There is nothing innovative about this doctrine. The Virginia Assessment Bill, it must be remembered, allowed, in its final version, the taxpayer not only to select the church of his choice, but to elect secular education as the recipient. Nevertheless, one of the principal grounds upon which Madison attacked the Bill was that it used "religion as an Engine of civil policy."

In short, even if the purpose of the Act herein were to accomplish secular educational ends and even if the primary effect were to serve a secular educational end, the scheme would nevertheless be unconstitutional because it uses religious means (i.e., institutions) to accomplish this end.

That the secular means are at hand in the form of a public school system which now educates the majority of the children of the Commonwealth need hardly be argued. Furthermore, North Carolina educates 98.5% and Utah 97.7% of their children in public schools, and in the process, Utah spends more per capita than Pennsylvania.[16]

The majority below took no notice of this ground of unconstitutionality.

F. Act 109 Creates an Interdependence Between Religious Institutions and the State.

The defenders of the Act maintain that the result of the Act is to create a cooperate working arrangement between the Commonwealth of Pennsylvania and the parochial school system under which the parochial school system takes on a portion of the duty mandated in the Pennsylvania Constitution to maintain a public school system and, in turn, the State, *pro tanto*, supports the parochial system.

But Justice Douglas, concurring in *Schempp*, said the Establishment Clause forbids "a working arrangement between the two bodies [church and state]."

The concept that interdependence offends the principles of separation likewise dates at least from the *Memorial and Remonstrance* and, as a concept, from Roger Williams and John Locke. As Mr. Justice Frankfurter commented in *McGowan v. Maryland, supra*, "What Virginia had long practiced, and what Madison, Jefferson and others fought to end, was the extension of civil government's support to religion *in a manner which made the two in some degree interdependent, and thus threatened the freedom of each.*" (p. 465) (Italics added.)

It was the evils of interdependence which was at the core of Mr. Justice Rutledge's dissent in *Everson:*

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16. *Statistics, Nonpublic Elementary and Secondary Schools, 1965-66*, Office of Education, U. S. Department of Health, Education and Welfare, OE-20111, Table B.

"There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. Madison's Remonstrance, Par. 6, 8. The great condition of religious liberty is that it be maintained free from sustenance, as also from interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting. *Id.*, Par. 7, 8. Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another."[17]

The perils of divisive religio-political struggles for greater shares of tax money, once the constitutional door is opened, was one of the prime grounds upon which Chief Judge Hastie dissented. Noting that there are other, even more secular activities of churches than education, such as care and shelter for the poor and aged, he said:

"If the Constitutional bar to state grants in all such cases should be removed, it is reasonable to anticipate continuing political controversy in every state and local community whether and to what extent public funds are to be granted to subsidize a large number and a broad range of activities of religious organizations. Leaders and devout members of various organized religious groups will see it as their duty to their church or sect

17. The strife which absolute separation seeks to avoid has apparently already been engendered by Act 109:

Rep. Bair, Legislative Journal—House, May 7, 1968, p. 507: "This question has caused much bickering, much hard feeling, and has torn apart both sides of the aisle. It has been constant trouble to the various members; it has torn communities apart.

* * *

"This bill that is before us today has caused more hard feelings and more unrest than anything else."

to seek such aid and to insist that state and local government contribute liberally to their sectarian enterprises. Legislators, government executives and candidates for elective office in whose judgment other claims upon the public purse merit higher priority can anticipate political opposition as enemies of the faith. In this way religion and politics will become *in pari materia*.

"So far we have escaped much of the divisiveness and antagonism of political differences and controversies about religious matters because public financing of activities of religious organizations has been understood to be prohibited by our Constitution." [App. A106]

The face of the Act, adopted by the majority below, asserts that the church schools are performing, in part, a public, secular function. But this Court, speaking through Mr. Chief Justice Burger, in *Walz v. Tax Commission of the City of New York*, No. 135, October Term, 1969 (May 4, 1970), 38 LW 4347, recognized that churches perform a variety of public functions and declined to sustain tax exemptions on that basis:

"We find it unnecessary to justify the tax exemption on the social welfare services or 'good works' that some churches perform for parishioners and others—family counseling, aid to the elderly and the infirm, and to children. Churches vary substantially in the scope of such services; programs expand or contract according to resources and need. As public-sponsored programs enlarge, private aid from the church sector may diminish. The extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social wel-

fare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimentions." 38 LW at 4350.

Here, according to the findings on the face of the Act and the theory of the Commonwealth, the state is in part dependent under Act 109 on the parochial school system for furnishing education.

"The hazards of churches supporting government are hardless less in their potential than the hazards of governments supporting churches; each relationship carries some involvement rather than the desired insulation and separation." *Walz v. Tax Commission of the City of New York, supra,* 38 LW at 4350.

The dependency of the church institution upon the state is equally offensive to the First Amendment, and those proponents of aid to their religious school systems are treading on dangerous ground, since traditionally in American politics control follows aid.[18]

One provision of Act 109 is potentially ominous from this standpoint. Section 5603(3) of the Act forbids "any subject matter expressing religious teaching, or the morals or forms of worship of any sect," to enter into the teaching of the named subjects.

Now, although the appellees ridicule the idea that any religious material could creep into the teaching of mathematics, physical sciences, modern foreign languages and

18. "It [the parochial school system] does not want to become a state operation. It wants some help . . ." William B. Ball, counsel for the Pennsylvania Catholic Conference, testifying before the Committee on Basic Education, April 16, 1968, p. 58.

physical education, and the majority below assumed the same, it is obvious that "modern foreign languages," since that perforce could embrace the whole literature of a nation, could be a vehicle for unlimited religious indoctrination. What is perhaps less obvious, but which would be demonstrated by discovery, is that many areas of knowledge and teaching within the designation "physical sciences" not only *can,* but, to be true to several particular faiths, *must* be taught with a religious hue; must, at very least, be God-oriented. Appellants offer to prove, if given the opportunity, that a Catholic cleric teaching in a parochial school who teaches astronomy for instance, without any reference to God violated his religious training.

More specifically, appellants offer to prove, for example, that one of the defendant schools, the Montgomery Christian Academy, in a physical science course, teaches the Biblical account of the creation and merely "exposes" the students to the theory of evolution, as a hypothesis which it advises its students is not believed by the school authorities.

Now, appellants do not object to any of this being done because of a belief that it is wrong. They object, on the contrary to the state placing itself in a position of requiring the Superintendent of Public Instruction to stop it. That is what Section 5603(3) requires.

Since the proceedings below were cut off at the threshold no one knows how the state proposes to police the classrooms. Interrogatories already filed would, if allowed to be answered, shed some light. Will the Superintendent of Public Instruction make announced visits? or surprise visits? Given the understandable proclivity for a teaching nun to select readings in French which "reflect the morals . . . of any sect" [§ 5603(3)], perhaps undercover student agents would be necessary to insure that the French class stays secular.

To those of deep and permeating faith there is no such thing as a "secular subject."

Indeed, it is this proposition to which, to its credit, the Catholic church has steadfastly adhered and is the reason it maintains a parochial school system.

As Mr. Justice Brennan said in *Schempp:*

> "It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil policy, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government." [At 259.]

Again and again scholars of the concept of separation have reverted to this question of the evils of interdependence which inevitably occur when secular and religious operations are blended, with the state as a party. The concern is no less the protection of religious bodies from state interference as it is the converse. For as Madison observed, what the state can foster and aid it can likewise deter and control.

Schempp quoted with approval one of Pennsylvania's most distinguished Chief Justices, Jeremiah S. Black, as follows:

> "The manifest object of the men who framed the institutions of this country, was to have a *state without religion* and a *church without politics*—that is to say, they meant that *one should never be used as an engine for any purpose of the other . . .*" Essay on Religious Liberty, Jeremiah S. Black, 1886, p. 53.

The various aspects of the establishment clause tend to interlock and support each other; they form a continuous web of separation. Thus the forbidden concept of interdependency discussed in this section has aspects of the con-

cept of "neutrality" so basic in the First Amendment concept of a proper relationship between government and religion. The majority put this well in the *Schempp* opinion:

> "The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about *a fusion of governmental and religious functions or a concert or dependency of one upon the other* to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits." (Italics added.) (p. 222)

Act 109 does in fact fuse governmental and religious functions and the appellees, particularly the Commonwealth, are the first to say so. It also brings about "a concert or dependency of one upon the other." Indeed, again so clearly is this a characteristic of the Act that it is put forward by the defense as one of its virtues.

The court below declined to allow the inquiry to be made with respect to Act 109 suggested by Mr. Justice Brennan, concurring in the *Schempp* case:

> "A more fruitful inquiry, it seems to me, is whether the practices here challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent." 374 U. S. at 236.

The contention that a forbidden interdependence is created by the Pennsylvania Nonpublic Elementary and Secondary Education Act is one of the prime issues in need of the full resources of federal discovery and evidentiary procedures in order to be presented for judicial decision with that completeness of record to which the Court is entitled.

PART II.
ACT 109 VIOLATES THE FOURTEENTH AMENDMENT.

A. The Allegations of the Complaint.

Act 109 on its face and as applied violates the Fourteenth Amendment in that it constitutes a denial of the equal protection clause.

The Complaint in paragraphs 14 and 15 alleges that the Act authorizes payments of tax funds to educational institutions whose policies and practices, by purpose or effect, exclude from admission, or otherwise discriminate against persons by reason of race or religion. It also alleges that tax funds will be disbursed to private educational institutions which by purpose or effect discriminate by reason of race in the employment of teachers and other persons to administer the educational services specified in the Act. The complaint charges three things under the Equal Protection Clause of the Fourteenth Amendment:

(1) Racial discrimination as to students admitted to the institutions;

(2) Religious discrimination as to students admitted to the institutions;

(3) Racial discrimination in employment;[19] and

(4) Religious discrimination in the de facto exclusion of all but chosen sects as to the benefits of the Act.

Appellants contend that the payment of substantial amounts of tax funds for the support and maintenance of

19. Paragraph 15 of the Complaint charges with respect to discrimination in employment, discrimination by reason of both race and religion. Plaintiffs press only racial employment discrimination.

these private institutions as they now exist constitutes state action which is reached by the equal protection clause of the Fourteenth Amendment.

B. Standing.

The lower court adopted a very narrow view of *Flast v. Cohen*, 392 U. S. 83 (1968), in holding that even the one taxpayer who had paid the precise tax from which the funds for the subsidy were derived, although a Negro with children in the public schools, could not raise the equal protection issues which alleged harm to the public schools unless it were alleged that his particular children were refused admittance to a school receiving aid. Appellants contend that the nexus between the putative party's taxpayer status and the particular grounds for his attack upon legislation as delineated in *Flast* was intended to be a generic test and that that nexus exists with respect at least to the Negro appellant Alton Lemon.

Furthermore, standing under *Flast v. Cohen* being a matter of judicial judgment, the evidentiary material as to the extent and impact of discrimination in nonpublic schools may affect the standing question. If it can be demonstrated that, even though Alton Lemon's children have not applied for admission to a nonpublic school, the effect of Act 109 in perpetuating, and perhaps increasing, segregation is such as to have an adverse effect upon Negro children in the public schools, Lemon's standing may be enhanced.[20]

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20. In *Coffee, et al. v. State Education Finance Commission*, 296 F. Supp. 1389 (1969), challenging a Mississippi tuition grant statute, to private school pupils, the three-judge court did not find a standing problem where the complaint alleged (Complaint, Para. 3) that the plaintiffs were Negro students and parents of Negro students in the *public* schools. There was no allegation that any had sought entrance to the white private schools. This case was not appealed.

C. Dismissal of Complaint on Motion.

The principles governing the circumstances under which a motion to dismiss may be granted, discussed at the beginning of the brief, are particularly apposite in the case of the Third Count of the Complaint because of the necessity for discovery on the point. The applicable law will be discussed below but it will be readily seen that in this situation the Court will have to decide whether, in the light of the degree and pervasiveness of the discrimination, the involvement of the state is of a sufficient degree to constitute "state action". A court cannot "sift facts" or "weigh circumstances" on a motion to dismiss. Therefore, the doctrine that a complaint may not be dismissed for failure to state a cause of action unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which can be proved in support of the claim should have been strictly adhered to.

D. The Known Facts With Respect to Racial Discrimination.

Discovery is required to develop the statistics of discrimination; but some facts are known.

The nonpublic school system in Pennsylvania is a white school system.

The private non-church-related schools are white schools, some of which in recent years have accepted a few token (middle-class) black students.

The non-Catholic church-related schools are virtually 100% white.

The Catholic parochial school system has a larger percentage of black pupils, but it is segregated. The only figure that is known at this time is the percentage applicable to Catholic schools inside the City of Philadelphia, which is understood to be 6%. This must be measured against a Negro enrollment of 59% in the Philadelphia

public schools.[21] The Philadelphia Archdiocesan schools have more white students than the public schools. However, if the figures are taken for the greater Philadelphia area which comprises the Archdiocesan School System (Philadelphia, Delaware, Montgomery, Bucks and Chester Counties) this percentage would drop precipitously, since for all practical purposes, Catholic schools in these counties have no Negro enrollment. Furthermore, the 6% figure for the schools inside the City of Philadelphia is deceptive. Over half the schools have no Negro pupils at all. Half of the remaining have an average of 7% Negro. Data from the Human Resources Center of the University of Pennsylvania derived from the Office of the Superintendent of Philadelphia Archdiocesan Schools shows that over half of the Negro enrollment is in fifteen all-black schools. These schools are mission schools. To its great credit the Philadelphia Archdiocese supports and maintains fifteen black ghetto schools for black children . . . but this is not integration.

In addition to the fifteen schools that are 100% black, a substantial number of the rest of the black students in the parochial school system in Philadelphia are in three schools where the percentage of black students is above 85%. By contrast, there are eight smaller schools where the mixture between black and white is between 40 and 60%. But the total number of students in these schools as of June 1966 was only 2,920 as contrasted with 6,366 in the all-black schools. The remainder, and vast proportion of the system even in the City of Philadelphia, is white. Over 26,000 parochial school students attend school with a black enrollment of between 5 and 9%. Over 71,000 pupils attend schools with no black students at all.

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21. Board of Education statistics do not include Puerto Ricans as non-white. They comprise an additional 2½%. It is not known how the Archdiocese counts Puerto Ricans.

The above figures are only those for the City of Philadelphia. In the four surrounding counties discovery would show that the black enrollment is but a fraction of 1%.

It is, one hopes, scarcely necessary to say that appellants make no charge here that the Catholic church intentionally promotes or seeks to perpetuate racial discrimination and one recognizes that racial imbalance is inherent in a school system which exists for the purpose of teaching Catholic children in a society where almost no Negroes are Catholics.

Also, lest it be misunderstood, this brief, written without benefit of discovery, focuses in this section on the situation in the Philadelphia Catholic schools because of an absence of precise data with respect to non-Catholic church-related schools and private non-church-related schools. If this data is provided it will undoubtedly reveal a pattern of greater segregation and discrimination, probably less justified, than the above.

With respect to discrimination in employment of teachers and administrative personnel, it is, in all of the non-public schools, virtually total and complete. As discovery would reveal, a black teacher or administrator (and even clerical personnel) will be found to be a rarity in the recipient schools.

The defendant schools taken strong exception to the allegations of the Complaint contained in Paragraph 5, which alleges that the future consequences of the Pennsylvania plain will be the establishment of two school systems: "A public school system predominantly black, poor and inferior, and a nonpublic schools system predominantly white, affluent and superior." [App. A10]. Of course, there is nothing objectionable about them from the standpoint of federal pleading and allegations of this same general tenor generalizing about the effects of racial discrimina-

tion in the schools can be found in the original complaint in *Brown v. Board of Education,* 347 U. S. 483 (1954). Allegations predicting future events which will come about as a result of certain unconstitutional state action are present in the complaint of *Dombrowski v. Pfister,* 380 U. S. 479 (1965).

The defendant schools take particular exception to the statement in Paragraph 5 that one of the effects of Act 109 will be to enable parents seeking to escape association of their children with fellow Negro students to more easily do so. They characterize this allegation as scandalous. The charge is not scandalous; the fact is. But actually, it comports with the report of President Nixon's Task Force on Education as reported in the Congressional Record, March 12, 1969, page H1660:

> "Lastly, we must call attention to the close relationship between one aspect of the Church-State issue and the enforcement of Civil Rights legislation. The more it becomes public policy to try to circumvent the First Amendment by aiding private schools indirectly through aid to the individual student under the 'pupil benefit theory,' the greater the danger of undermining integration efforts in those states where substantial numbers of parents have sought to avoid the consequences of integration by sending their children to private schools. . . ."

The allegations of Paragraph 5 are of major import in this litigation for there are two issues at stakes in this case: One is whether the traditional separation of church and state is to be maintained or whether the state and the church (or at least some of the churches) are to become engaged in a joint undertaking, and hence to become intertwined and interdependent. The other is whether the United States is to have, like Northern Ireland and the

Netherlands,[22] a dual school system, both publicly supported, one secular and one religious.

One of the "predictions" of Paragraph 5 of the Complaint is that one effect of the plan of aid (which will inevitably increase) embodied in Act 109 is that less money will be available for the public school system, thus accelerating the flight of middle-class whites from the public schools. This fact was recognized by many members of the legislature. It is obvious that the initial $5 million to be paid out in the school year 1969-70 will be only the beginning if this Act is upheld. In 1969 the Pennsylvania House of Representatives had under consideration a bill providing $23 million in state aid to nonpublic schools.

That there is in fact "discrimination", as well as racial imbalance, would appear to be clear from the fact that an opinion of the Attorney General (in the form of a supplemental memorandum of law filed at the request of the lower court after oral argument), ruled that Article VII of the Governor's Code of Fair Practices entitled, "Public Contracts", which reads as follows:

> "Every state contract for public works or goods or services shall contain a provision barring discrimination on account of race, color, religious creed, ancestry, age, national origin or sex, and such contractual provisions shall be fully and effectively enforced." [App. A72]

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22. A memorandum prepared by the Chief Counsel of the Committee on Basic Education of the House, part of the public record in Harrisburg, records the following:

> "It would encourage a proliferation of school systems, or at least a dual school system. The danger to the public school system is illustrated by the experience in Holland where some 80% of the students attended public schools. The Constitution was amended permitting aid to nonpublic schools and today only 20% of the students go to public schools. It has also brought about profound changes in the social, economic and political structure of the country."

is, in effect, suspended with respect to religious discrimination as to contracts under the Pennsylvania Nonpublic Elementary and Secondary Education Act.[23]

E. The Court Below Should Have Permitted Appellants to Develop Material on the Alleged Equal Protection Violation.

There are two elements of discrimination in Act 109 on which the appellants have no cases directly in point under the equal protection clause. The first is the discrimination, on religious grounds, in the selection of pupils and employees, as a violation *of that clause*. But it is contended that all of the material developed in the previous portion of the brief with respect to the preference of one sect over others establishes that the state cannot so discriminate under the First Amendment, and that therefore the question will turn on whether or not Act 109 constitutes sufficient involvement of the state in aiding *de facto* racially segregated institutions as to also constitute "state action" violative of the Fourteenth Amendment.

Nor do appellants have a case directly in point on state subsidy to a segregated private school system where the

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23. This situation came about by reason of the fact that, by agreement of counsel prior to hearing on the motion to dismiss the Complaint, appellants took the deposition of Vincent J. McCoola, Coordinator of the Act, who testified that the Department of Education was not including in the contracts with the nonpublic schools the above quoted nondiscrimination clause required to be in all state contracts. The question was raised at oral argument and the apparently insoluble dilemma was resolved by the Attorney General's ruling.

Subsequently, with respect to a companion Pennsylvania statute, Chief Judge Hastie, in his dissenting opinion, said:

> "It is difficult to see how the provision of the Pennsylvania Fair Educational Opportunities Act that sanctions religious discrimination in admission policies and practices of sectarian schools could validly be applied to sectarian schools that receive public financing under Act No. 109. 24 P. S. § 5004(c)." [App. A106]

segregation is primarily *de facto* and where the primary purpose of the legislation was not the perpetuation of formerly *de jure* segregation. Nevertheless, cases do exist upon which such a ruling could be founded, particularly if appellants are permitted to develop the extent of the state action by discovery and evidence.

As Judge Wisdom said in *Poindexter v. Louisiana Finance Assistance Commission*, 275 F. Supp. 833 (1967); aff'd *per curiam*, 389 U. S. 571 (1968). "There is no such thing as the State's legitimately being just a little bit discriminatory."

That case was a class action brought by Louisiana public school children and their parents attacking the constitutionality of an act authorizing tuition grants to pupils attending private schools in Louisiana. The three-judge court consisted of Wisdom, Circuit Judge, and Christianberry and Ainsworth, District Judges. The Court decided that the purpose and effect of the act was to continue segregated education in Louisiana by providing state funds by way of tuition grants. The amounts involved were relatively small —in the neighborhood of $2 to $3 million.

> "The payment of public funds in any amount through a state commission under authority of a state law is undeniably state action. The question is whether such action in aid of private discrimination violates the equal protection clause.
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> * * *
>
> "But decisions on the constitutionality of state involvement in private discrimination do not turn on whether the state aid adds up to 51 percent or adds up only to 49 percent of the support of the segregated institution. The criterion is whether the state is so *significantly* involved in the private discrimination as to render the

> state action and the private action violative of the equal protection clause. (Here the plaintiffs ask only that the state be enjoined from paying the tuition grants; not that the schools be desegregated.)" p. 854.

Judge Wisdom said that the Supreme Court had never attempted to formulate an infallible test for determining whether the State had become significantly involved in private discriminations, and went on to state, "The facts must be sifted and weighed on a case-to-case basis." At 856. This points out again the need for discovery as to the Third Count. Judge Wisdom's conclusion, upon review of the cases, was this:

> "The cases in this area of law teach, however, that there is no constitutional basis for courts to adopt as a test the predominance of state financial support." [p. 856]

As noted above, this case was affirmed, *per curiam*, by the Supreme Court.

Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961), indicates that the involvement of the state may be slight and indirect. There the Supreme Court said:

> "Only by sifting and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." [p. 722]

In *Griffin v. County Board of Education of Prince Edward County*, 377 U. S. 218 (1964), however, the Court seemed to require that the state support of a segregated school be "preponderant" for there to be a finding that there was "state action." As will be seen, the concept of what constitutes "state action" has been broadened since 1965.

The case of *Reitman v. Mulkey*, 387 U. S. 369 (1966) can only be read as substituting a new test for either "the

determinative" or "the preponderant" test of *Griffin*. The test of "state action" in *Reitman* was "significant involvement."

But there is more than that in the *Reitman* decision which is highly pertinent to the instant case. First of all, the Court clearly backed away from the rigidity of *Griffin* and invited ad hoc determination (as Judge Wisdom likewise perceived in *Poindexter*) by saying that the "court has never attempted the 'impossible task' of formulating an infallible test for determining whether the state 'in any of its manifestations' has become significantly involved in private discriminations."

The Court in *Reitman* spoke of "the necessity for a court to assess the potential impact of official action in determining whether the state has significantly involved itself with invidious discrimination." Its "potential impact," in addition to present discrimination, is what is plead in Paragraph 5 of appellants' Complaint.

There cannot be the "sifting and weighing" required by *Burton v. Wilmington Parking Authority, supra,* nor an assessment of "the potential impact of official action" required by *Reitman* without the opportunity to present evidence.

CONCLUSION.

With respect to the First Amendment:

This Court can, at this stage, recognize that Act 109 is unconstitutional on its face and now so rule with the thought that evidence cannot save a facially unconstitutional enactment.

Alternatively, the controversy can be ended at this stage by adding to the Complaint and the text of the Act, both of record, the legislative history by taking judicial notice of official legislative records of the Commonwealth

of Pennsylvania,[24] finding that they establish a primary legislative purpose to aid religion and declaring Act 109 unconstitutional.

On the other hand, there is not sufficient record before the Court to declare the Act constitutional because several of the appellants' constitutional contentions, all supported by Supreme Court cases, require evidence to establish the factual record upon which they are founded. An example is the contention that the Act prefers one religion over all others (with minor preference to two or three others), for this contention is based upon certain facts which, although they are drawn from official governmental documents, are not technically of record, e.g., that 97% of the schools receiving are subsidy are Roman Catholic. Likewise, the contention that the purchase of services device is a scheme to make it appear that the state is receiving a *quid pro quo* for its tax money, (although discerned by the dissenting judge from the fact of the Act itself) would be buttressed (a) by proof from the appellants as to the way in which the Superintendent of Public Instruction is administering the Act and making payments; (b) the fact that no new or different or additional children are being educated in the named courses; and (c) that the cost-reimbursement formula capriciously favors the richest and highest-cost schools.

The relief sought, therefore, of the Supreme Court is either a declaration of unconstitutionality or reversal and remand with guidelines for the three-judge court to proceed with the usual course of litigation at the District Court level.

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24. The Addendum contains extensive extracts. The physical records, in the form of copies of typed transcripts certified by the court stenographer and photostatic copies of the printed Journal of the House and Senate are all in counsel's possession and could be physically filed with the Clerk of the Supreme Court, if so ordered.

With respect to the Fourteenth Amendment:

The Court should either (a) rule on the standing issue, particularly with respect to Alton Lemon, or (b) accord Alton Lemon standing *pro tem* for discovery and trial on the theory that this is needed to properly resolve the standing issue. This would leave the question of whether the Complaint states a cause of action under the equal protection clause of the Fourteenth Amendment undetermined. Since the appellees would then be in a posture of having a Motion to Dismiss Count III, For Failure to State a Cause of Action, of record and not ruled upon, this Court might see fit to determine that question.

Respectfully submitted,

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June, 1970.

ADDENDUM TO BRIEF.

Legislative History of Act 109.

Any reasonably informed reader of the public press in Pennsylvania in 1967 and 1968 could have little doubt as to what the problem was that led to Act 109. Catholic churchmen and educators from one end of the Commonwealth to the other proclaimed the need of the parochial school system for State funds. A dozen different schemes were proposed by various legislators, some of which seemed unable of passage, some of which were threatened with veto by the governor, and one of which finally passed. All of this was carried on with considerable publicity, and dozens of committees, groups and institutions were arrayed for and against such aid. Letter-writing campaigns were organized. Delegations called upon legislators. But we recognize that although this matter is almost one of which the Court could take judicial notice,[1] we must turn to the official record to definitively prove the legislative purpose, since Pennsylvania, unlike many states, com-

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1. "The defendants argue that we should not probe for the purpose of this legislation, that we should ignore the events which led up to and accompanied its passage, and determine its validity based on its language. But '. . . we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men.'" 197 F. Supp. 649 (1961) at 652; (citing Mr. Justice Field, sitting as Circuit Judge in *Ho Ah Kow v. Nunan*, Fed. Cas. No. 6, 546, 5 Swy. 552, 560). *Hall v. St. Helena Parish School Board*, aff'd per curiam 368 U. S. 515 (1961).

mittee proceedings are transcribed and debates are printed in a Journal.[2]

The hearings on the bill which actually passed and became Act 109 (House Bill No. 2170) and on other alternative methods of aiding Catholic schools (such as House Bill No. 2085 which provided tax credits to parents with children in parochial schools) opened on April 3, 1968 before the Committee on Basic Education. That opening hearing was devoted to and is entitled, "Aid to Non-Public Schools, Method—Vehicle." The Chairman of the Committee, Representative Donald W. Fox, stated the problem before the Committee as follows:

> "Very briefly, before we begin I want to make this general statement. The previous hearings of this Committee brought out the fact that some twenty percent of the school children in Pennsylvania are being educated in nonpublic schools and that many of these school systems are in serious financial difficulty. The Committee now has been asked to try to find out if state funds can be used for aid to nonpublic schools. These hearings are to explore in depth and in as scholarly and objective way as possible the mechanics, costs, controls and constitutionality of public support of private schools."

After the introduction by the Chairman, Mr. Edward Hussie, a member of the Committee staff, made a presentation, at length, on "methods used to aid nonpublic schools."

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2. Judges Wisdom, Christenberry and Wright, in the *Hall* case (cited in the preceding footnote), having no such official legislative record available in Louisiana, said: "In Louisiana, as in most states, the legislative debates, committee proceedings, and committee reports are not recorded officially. Going to the next best records, newspapers, . . ." and concluded that, "The sponsors of this legislation, in their public statements, if not in the Act itself, have spelled out its real purpose." Fn. 8 at 649 of 197 F. Supp.

He did not testify on methods of improving education or methods of aiding the teaching of mathematics, modern foreign languages, physical sciences and physical education. Mr. Hussie reviewed all of the different means by which money could be gotten to religious schools: "Most notably," as he said, "those that pertain to the health and safety of the child." All of these methods, including textbooks, textbook aids, devices of various types, released and shared time, etc., were reviewed as they exist in the various states of the country. (Mr. Hussie did not suggest that there was any plan anywhere like that in Act 109.) [Hearings, April 3, 1968, Tr. 6, et seq.]

There then appeared as a witness Dr. B. Anton Hess, Commissioner of Basic Education, Department of Public Instruction [Hearings, April 3, 1968, Tr. 12, et seq.], and if anyone might have enlightened us as to purely educational and pedagogical, i.e., secular, problems and proposed solutions it surely would have been Dr. Hess. But Dr. Hess did not suggest that there was any lack of teaching these subjects in the public schools or that there were any children not being educated in these subjects. Dr. Hess addressed himself only to enumerating the existing child benefits and auxilliary programs which in some way aided parochial school children.

In fact, under questioning by Committee counsel, Dr. Hess said that with some lead time notice to make preparation, it would be possible "for all of the students in the catholic schools in Philadelphia to be taught math, sciences and languages next September by the public schools" and that the Philadelphia school system then "would have included in their subsidy from the State credits proportionately for those students." [p. 18].

After the staff report and that of the Superintendent of Public Instruction, the lead witness was William B. Ball, Esq., counsel for the Pennsylvania Catholic Conference.

[Hearings, April 3, 1968, Tr. 20, et seq.] Mr. Ball commenced by adverting to the fact that "for the past fourteen months such spokesmen [for Catholic and Hebrew schools[3]] and representatives have been trying at any rate to state their case to the General Assembly in considerable detail." He agreed with the opening statement of Chairman Fox as to what the problem was and then commented on the various programs designed to benefit all children including parochial school children, and went on to state that shared time programs simply were not sufficient to solve the problem, i.e., provide sufficient financial relief [pp. 20-23].

Mr. Ball testified that it was the view of the Pennsylvania Catholic Conference, "That the solution of Pennsylvania's educational crisis is to afford nonpublic education a measure of support, within strict constitutional limitations, sufficient to enable it to continue to render its public service." [p. 26] Mr. Ball reviewed the various aid proposals at length and finally, at p. 37, recommended the method of purchase of secular educational services as reflected in House Bill No. 2170.

Representative Charles H. Dager, Legislative District No. 151, Montgomery County, testified [Hearings, April 3, 1968, Tr. 68] that, "The advocates for aid state that their schools are in a financial crises and if aid is not forthcoming from government, they will be forced to close their schools and send the children to the public school system." He opposed financial grants, however, on the grounds that they "can only grow and result in the state ultimately financing two or more separate school systems." [Tr. 70] He therefore advocated a tax credit approach by referendum by a majority of voters of a specific school district.

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3. In fact the record reveals that only one Jewish spokesman, Dr. Cohen of Beth Jacobs Academy, testified in favor of the Bill. The Rabinnical Assembly and United Synagogue, the American Jewish Congress, the Jewish Community Relations Council of Philadelphia and Pennsylvania, testified against the Bill.

David A. Horowitz, Deputy Superintendent of Instruction of the School District of Philadelphia, testified as to the various programs in the City of Philadelphia in which there were joint educational ventures with the schools of the Philadelphia Archdiocese, particularly those federally funded projects under the Elementary and Secondary Education Act of 1965, providing for educational services to poverty area children. Those receiving services under Title I of that Act included 30,000 parochial school pupils in programs ranging from speech therapy, remedial reading and audio-visual aids at instructional materials centers set up by the School District of Philadelphia. He also discussed a shared time program and new facilities which would permit more extensive shared time programs. Dr. Horowitz testified further that the cooperation of the public school district with the Archdiocese was motivated by the requirement of administration of federal educational funds through public channels, the practical necessity being in planning on such matters as the location of schools and because it helps to effect educational integration since "the parochial school system having (sic) more white pupils and enrollment than we have in our system, despite the fact that our total enrollment is 280,000 and theirs is 160,000." (Hearings, April 3, 1968, TR 123)

Louis Canosa, Education Superintendent, Pennsylvania Conference of Seventh Day Adventists, testified (Hearings, April 8, 1968, TR 78) that the Seventh Day Adventists operate the second largest parochial school system in the world and have the highest proportion of their children in their parochial schools of any American denomination (six out of ten) and that they do this because "for many years churches have known that the parochial school is the strongest machine the church can operate for maintaining and increasing its membership and its strength."

Mr. Canosa testified against state subsidy and indicated that in any event the Seventh Day Adventists would continue to support their own school system.

Monsignor Edward S. Hughes, Superintendent of Education, Archdiocese of Philadelphia, testified [Hearings, April 8, 1968, Tr. 31] at length about financial need and the inadequacies of shared time.

James F. McGrath, President of the Association of Catholic Teachers, AFL-CIO, testified as to the future projected costs of the Archdiocesan Secondary School System.

And so it went throughout the hearing. The proponents uniformly testified not about an existing educational or pedagogical problem but about a financial problem.

It would serve no purpose to quote any more material from the hearings. They comprise five volumes and if the purpose of a bill is to be measured by looking at the problem that it was devised to cure, the sole and solitary purpose of financial aid to parochial schools is found.

The staff studies reveal the same concern. The Chairman of the Committee filed an extensive report based upon Mr. Hussie's staff study [Committee of Basic Education, House, Tr. 5, April 16, 1968] This study does not pose any general educational or pedagogical problem. It assumes that its task is to explore all the methods that have ever been suggested in the United States for financial assistance to the Catholic parochial school system. The Chairman's Report to the House membership is comprised of four sections: "Vehicles," "Methods Used to Aid Non-Public Schools," "Standards and Controls," and "Standards and Controls—What Other States Are Doing." In this extensive Committee study there is not the slightest suggestion that there is any purpose under consideration other than finding a way to channel funds to the Catholic parochial school system. The study's reference to the testimony of personnel of the Department of Public Instruction

does not advert to any secular purpose or pedagogical need. The study notes that the Department declares itself ready, with reasonable notice, to cope with additional students.

The Bill as presented to the House (House Bill No. 2170) provided for an authority which was to enter into contracts with nonpublic schools. It came before the House on second consideration on May 7, 1968. Representative Fox, as Chairman of the Committee, immediately presented amendments which eliminated the authority and vested the administration of the Act in the Department of Public Instruction,[4] it having been Mr. Ball's opinion, in his second appearance on April 17, 1968, that the authority device "does nothing to insulate the program constitutionally." [Hearings, April 17, 1968, Tr. 50] The amendments were supported by the principal sponsors and Rep. Mullen said he was in favor of the amendment because the authority might raise additional constitutional problems and, as he said,

> "We know we have problems, but we do not want to make them any more complicated than what we have."[5]

Rep. Fox offered an amendment confining the source of the funds to flat racing only and moving the effective date of the Act from July of 1968 to July, 1969, giving as his reasons that there was not enough money available to the State to finance the recently passed bill providing additional money for public schools. Rep. Coppolino opposed the amendment, saying,

> "The need for aid to nonpublic schools is immediate. The nonpublic schools cannot be aided immediately by the proposals made in this amendment."

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4. Id., at 501.
5. Id., at 500.

Rep. Mullen also opposed the amendment on the same grounds, saying,

> "We need the money now; we need the money next February when the services to be rendered under the terms of the bill, the first half of the services, would be completed."[6]

Debate then commenced (Legislative Journal—House, p. 503, et seq.) on the consitutionality of the Bill. Rep. Mullen stated,

> "We certainy do have in mind a legitimate secular legislative purpose, and that purpose is simply to educate boys and girls who are attending nonpublic schools."[7]

A vote was taken on a point of order that the bill was unconstitutional; it was defeated 113 to 70.

Rep. Nicholson offered an amendment authorizing each school district to supply school teachers to nonpublic schools within the district for the purpose of teaching the same four courses, the school district to be proportionately reimbursed. Rep. Nicholson contended that this would be the simplest and least expensive way to accomplish Rep. Mullen's secular objective of educating boys and girls in these subjects who were attending nonpublic schools. That amendment was opposed by the proponents and defeated 109 to 76.

Rep. Dager offered a complex amendment providing for a referendum in each school district on the question of granting a tax credit against any taxes for school districts of any payments made by the same taxpayer. In arguing for his amendment Rep. Dager spoke of the

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6. Id., at 502.
7. Id., at 504.

". . . decision of this legislature that the aid to nonpublic schools should be given . . ." *Id.*, 509

House Bill No. 2170 came on for third consideration the following day, May 8, 1968, and is reported commencing at p. 531 of the Legislative Journal—House. Lengthy remarks on constitutionality of the Bill are spread upon the record, Legislative Journal—House, pp. 532-545. A number of members of the House (Messrs. Ryan, Gelfand, Kester, Donaldson) urged that the matter of constitutionality could only be settled by the courts. Indeed, Rep. Gelfand said that although it was his "firm conviction" that the measure was unconstitutional, he was going to vote for it so that this issue could be decided "ultimately in the United States Supreme Court, and not by this body, which is subject to many pressures other than that issue at hand." [p. 543.] Some speakers talked in terms of shortage of money for the public schools, e.g.,

> "This House passed and sent to the Senate a [public] Teachers' Salary Bill that is $19 million in excess of what the administration and, apparently, what the Senate majority believes was available." [p. 544 (House)]

The two principal sponsors, Rep. Mullen and Rep. Coppolini, repeated their arguments for a "fair share" of tax money, and the debate closed with Rep. Fox, Chairman of the Committee, acknowledging problems of financing public education.

> "Our nonpublic schools are in a desperate financial situation, especially the Catholic parochial schools which represent about 90 percent of the nonpublic school system." [p. 545 (House)]

The Bill whereupon went to vote and passed 105 to 80.

The Bill reached the Senate on second consideration on June 11, 1968 and on third consideration the following day. Debate on the constitutionality of the Bill ensued. On the merits only Sen. Oesterling and Sen. Lamb spoke in favor. Both made only one point as to the legislative purpose of the Bill. Sen. Oesterling said:

> "Today, however, they [nonpublic schools] find themselves in a situation—and not an uncommon situation—where they need financial aid. They have now looked to the Commonwealth for assistance, and neither is this uncommon, Mr. President." Legislative Journal—Senate, p. 385.

Sen. Lamb stated:

> "I think House Bill No. 2170, as it is before us today, is the product of years of study, and a long search by interested people into what we could do to meet the problem that the private schools are having in Pennsylvania with respect to just keeping their doors open." [p. 385]

The Bill passed the Senate 33 to 14.